

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the  
License of John and Teresa Smith to  
Provide Adult Foster Care

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on August 18, 2011, at the Cass County Health, Human, and Veteran's Services Center, 400 Michigan Avenue, Walker, Minnesota 56484. The hearing record closed at the end of the hearing on August 18, 2011.

Barbara J. Harrington, First Assistant Cass County Attorney, represented the Department of Human Services (the Department) at the hearing. Teresa Smith (Licensee) appeared at the hearing without legal counsel. Mr. John Smith, co-Licensee, did not appear at the hearing either in person or through counsel.

**STATEMENT OF THE ISSUE**

The issue is whether the Department of Human Services' order of revocation of Licensees' adult foster care license must be upheld because Licensees have a permanently disqualified person living in the foster care home.

The Administrative Law Judge concludes that the Commissioner must confirm the order of revocation because, at the time of the hearing, a permanently disqualified person was living in the foster care home.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Ms. Smith (Licensee) and her husband have been licensed to provide adult foster care services in their home in Pine River, Minnesota since 2006.<sup>1</sup> Licensee and her husband currently provide care for two adult males, JF and NV.<sup>2</sup>

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<sup>1</sup> Testimony of Teresa Smith; Test. of Amy Lebeck, Cass County (the "County") Social Worker and Licensor; Exhibit 3.

<sup>2</sup> *Id.*; Exs. 13, 15 & 17.

2. Licensees have been caring for JF for 16 years.<sup>3</sup> They have been caring for NV for 16 years.<sup>4</sup> Licensees began caring for them when they were children.<sup>5</sup> When JF and NV were children Licensee operated with a child foster care license.<sup>6</sup>

3. Both JF and NV are non-verbal and have a variety of behavioral issues, including biting, scratching and spitting.<sup>7</sup> JF also suffers from seizures.<sup>8</sup> JF and NV require care and supervision 24 hours per day, seven days per week.<sup>9</sup> They are never left alone.<sup>10</sup> In addition to the Licensee, personal care attendants in Licensees' home also care for JF and NV.<sup>11</sup>

4. Also living in the home with Licensees is their 17-year-old son, JMS.<sup>12</sup> JMS was also one of Licensees' foster children before Licensees adopted him. JMS has lived with NV and JF since he was first placed with Licensees as a nine-year-old foster child.<sup>13</sup> JMS, NV and JF shared a bedroom together.<sup>14</sup>

5. JMS suffers from disabilities, including Attention Deficit Disorder and Fetal Alcohol Syndrome. His maturity level is not at the same level as an average teenage boy his age.<sup>15</sup>

6. JMS has always been protective of NV and JF and considers them his brothers. JMS has been protective of NV and JF to the extent he has suffered being bullied and beaten up by schoolmates because of his support for them. The bullying was such that the entire family had to move to Pine River from their prior residence.<sup>16</sup>

7. Licensees have cared for 130 foster children, have 48 foster grandchildren and 13 foster great grandchildren.<sup>17</sup> Licensee Teresa Smith has cared for many foster children that have been abused, including sexual abuse. She knows how to identify signs of such abuse.<sup>18</sup>

8. Except for the circumstances of this matter, there have been no issues, problems or violations regarding the Licensees. Licensees have given JF and NV

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<sup>3</sup> Ex. 17.

<sup>4</sup> Ex. 15.

<sup>5</sup> Test. of T. Smith & A. Lebeck.

<sup>6</sup> *Id.*; Ex. 13.

<sup>7</sup> *Id.*; Test. of T. Smith, Exs. 1 and 2.

<sup>8</sup> Ex. 13.

<sup>9</sup> Test. of T. Smith & A. Lebeck.

<sup>10</sup> Test. of T. Smith.

<sup>11</sup> Ex. 16.

<sup>12</sup> Test. of T. Smith.

<sup>13</sup> *Id.*

<sup>14</sup> Test. of A. Lebeck.

<sup>15</sup> Ex. 8.

<sup>16</sup> *Id.*

<sup>17</sup> Test. of T. Smith.

<sup>18</sup> *Id.*

“exemplary” care. The County has no concerns about the foster care delivered by Licensees.<sup>19</sup>

9. In August of 2009 during a family gathering on Licensees’ Pine River property, JMS and an eight-year-old niece were playing hide and seek in hay bales on the property. At that time JMS touched the girl near the vaginal area, without penetration.<sup>20</sup>

10. The girl told her stepmother and the stepmother told Licensee, Teresa Smith, on or about September 19, 2009.<sup>21</sup> Ms. Smith immediately called the County licensor, Ms. Lebeck, and relayed the allegations against JMS.<sup>22</sup> The County licensor also received a copy of a Child Protection intake report.<sup>23</sup>

11. Also on September 19, 2009, the County Sheriff’s Office received an intake report from County Child Protection regarding the allegations, including two earlier incidents alleging inappropriate touching of the girl by JMS.<sup>24</sup>

12. Because of the situation, the County licensor requested that JMS no longer share a bedroom with JF and NV. Licensees and JMS immediately complied with the request.<sup>25</sup>

13. On December 11, 2009, the County Sheriff’s Investigator interviewed JMS. JMS immediately admitted the August 2009 incident.<sup>26</sup>

14. On August 17, 2010, JMS pleaded guilty to criminal sexual conduct in the fifth degree, a gross misdemeanor, a violation of Minn. Stat. § 609.3451, subd 1, pursuant to a juvenile petition of delinquency.<sup>27</sup>

15. On September 28, 2010, the County District Court continued the petition for dismissal on the following conditions:

- a. That JMS successfully complete sex offender treatment;
- b. That he not possess pornographic materials or access pornographic materials on the internet or by any other means;
- c. That he refrain from all mood altering chemicals not prescribed by a doctor;

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<sup>19</sup> Test. of A. Lebeck.

<sup>20</sup> Exs. 2 and 8.

<sup>21</sup> Ex. 8; Test. of T. Smith.

<sup>22</sup> *Id.*; Test. of A. Lebeck.

<sup>23</sup> Test. of A. Lebeck.

<sup>24</sup> Ex. 8; Test. of County Sheriff’s Investigator Robert Stein.

<sup>25</sup> Test. of A. Lebeck.

<sup>26</sup> Ex. 2.

<sup>27</sup> Exs. 1 and 8.

- d. That he have no contact with the victim;
- e. That he have no unsupervised contact with females more than two years younger than himself;
- f. That he complete seventy-five hours of community service work, that to be done at the rate of at least fifteen hours per month;
- g. That he be placed on formal probation to the Cass County Probation Department and follow all the rules and regulations of the Cass County Probation Department.<sup>28</sup>

16. JMS completed all of the requirements of the continuation for dismissal and the September 28, 2010 court order.<sup>29</sup> The Court dismissed the petition on March 29, 2011.<sup>30</sup>

17. JMS intends to enter the United States military as soon as he loses six pounds. His military recruiter has taken him through the first Military Entrance Processing Station (MEPS). He has completed a military training program in Louisiana.<sup>31</sup>

18. NV's parents are aware of the situation involving JMS. They believe Licensees can best care for NV and that their environment is safe and caring. They are also convinced that removing him from Licensees' care would be devastating to him. They go on to state that:

We believe John and Terease (sp) are a blessing to us and him, (sic) to have the experience, structure, love and desire to care for our son.<sup>32</sup>

19. JF's mother, who is also his legal guardian, is aware of the situation involving JMS. She has no concerns with her son remaining with Licensees and considers JMS as JF's brother.<sup>33</sup>

20. JF's case manager is aware of the situation involving JMS and has "never felt for one moment that [JF] has been at risk." She goes on to opine that:

I am confident that after reviewing the situation it will be determined that Teresa provides a safe and nurturing home and that it is in [JF]'s best interest to remain in the home.<sup>34</sup>

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<sup>28</sup> Ex. 1.

<sup>29</sup> Ex. 20; Test. of T. Smith.

<sup>30</sup> Ex. 20.

<sup>31</sup> Test. of T. Smith.

<sup>32</sup> Ex. 15.

<sup>33</sup> Ex. 17.

<sup>34</sup> Test. of T. Smith.

## Procedural Findings

21. On December 22, 2010 the County sent JMS a determination letter that he is permanently disqualified from any position allowing direct contact with, or access to, persons receiving services from Licensees.<sup>35</sup>

22. On February 11, 2011, the County recommended to the Department that Licensees' adult foster license be revoked because "[t]he background study disqualification for [JMS] is permanent with a permanent bar to set aside."<sup>36</sup>

23. The Department issued an order of revocation on April 8, 2011.<sup>37</sup>

24. Licensees filed a timely appeal from the order of revocation and requested an appeal hearing pursuant to Minn. Stat. § 245A.07, subd. 2a.<sup>38</sup>

25. Licensee Teresa Smith inquired of the County licensor if she could retain her license if JMS no longer lived in her foster care home. The County licensor passed on the inquiry to the Department and was told that she could not advise the Licensee on the matter and that Licensee would have to handle the matter in the appeal hearing.<sup>39</sup>

26. On April 18, 2011, the Department executed a Notice of and Order for Hearing, scheduling a contested case hearing on August 18, 2011.<sup>40</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07, subds. 1 and 3.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department has complied with all relevant substantive and procedural requirements of law and rule.

4. Minn. Stat. § 245A.08 (3) (a) establishes the following burden of proof:

At a hearing regarding a licensing sanction under section 245A.07, including consolidated hearings under subdivision 2a, the commissioner

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<sup>35</sup> Ex. 8.

<sup>36</sup> Ex. 3, Test. of A. Lebeck.

<sup>37</sup> Ex. 4.

<sup>38</sup> Notice of and Order for Hearing.

<sup>39</sup> Test. of A. Lebeck.

<sup>40</sup> *Id.*

may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules occurred.

5. Minn. R. 9555.6125 (4) provides in relevant part as follows:

Subp. 4. **Qualifications.** Operators, caregivers, and household members must meet the qualifications in items A to G.

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D. Operators, caregivers, and household members must not have a disqualification under Minnesota Statutes, section 245C.15, that is not set aside under Minnesota Statutes, section 245C.22, or for which a variance has not been granted under Minnesota Statutes, section 245C.30.

6. Sexual contact with a child is a violation of Minn. Stat. §§ 245C.02, 609.3451, and 626.556.

7. Minn. Stat. § 245C.14 regarding **DISQUALIFICATION** provides in relevant part:

Subdivision 1. **Disqualification from direct contact.** (a) The commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from the license holder . . . upon receipt of information showing, or when a background study completed under this chapter shows any of the following:

(1) a conviction of, admission to, or Alford plea to one or more crimes listed in section 245C.15, **regardless of whether** the . . . **admission** is a felony, **gross misdemeanor**, or misdemeanor level crime. (emphasis added)

8. Minn. Stat. § 245C.02, regarding the definitions of terms applicable to Chapter 245C, provides, in applicable parts, as follows:

Subdivision 1. **Scope.** The definitions in this section apply to this chapter.

Subd. 2. **Access to persons served by a program.** "Access to persons served by a program" means physical access to persons receiving services or the persons' personal property without continuous, direct supervision, as defined in subdivision 8. . . .

Subd. 8. **Continuous, direct supervision.** "Continuous, direct supervision" means an individual is within sight or hearing of the program's supervising individual to the extent that the program's supervising individual is capable at all times of intervening to protect the health and safety of the persons served by the program. . . .

9. Minn. Stat. § 245C.15, regarding **DISQUALIFYING CRIMES OR CONDUCT**, provides in applicable part:

Subdivision 1. **Permanent disqualification.** (a) An individual is disqualified under section 245C.14 if: (1) regardless of how much time has passed since the discharge of the sentence imposed, if any, for the offense; and (2) unless otherwise specified, regardless of the level of the offense, the individual has committed any of the following offenses: sections . . . 609.3451 (criminal sexual conduct in the fifth degree); . . .

10. Minn. Stat. § 245C.24, regarding **DISQUALIFICATION; BAR TO SET ASIDE A DISQUALIFICATION; REQUEST FOR VARIANCE**, provides in applicable part:

Subd. 2. **Permanent bar to set aside a disqualification.** (a) Except as provided in paragraph (b), the commissioner may not set aside the disqualification of any individual disqualified pursuant to this chapter, regardless of how much time has passed, if the individual was disqualified for a crime or conduct listed in section 245C.15, subdivision 1."

11. Minn. Stat. § 245C.24, subd. 2 (b) does not apply in this matter.

12. Minn. Stat. § 245C.26, regarding situation where the disqualified individual no longer lives in the licensed home, provides:

In the case of any ground for disqualification under this chapter, if the act was committed by an individual other than the applicant or license holder residing in the applicant's or license holder's home, the applicant or license holder may seek reconsideration when the individual who committed the act no longer resides in the home.

13. Minn. Stat. § 245C.24, subd. 2 precludes the Commissioner from setting aside a permanent disqualification or granting a variance that would allow a permanently disqualified individual from living in an adult foster care home.

14. The best interests of JF and NV are that they remain in the care of the Licensees.<sup>41</sup>

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<sup>41</sup> Exs. 1 and 2; test. of T. Smith.

15. The Department has proved by a preponderance of the evidence that JMS committed a crime that results in a permanent disqualification that bars him from having direct contact with vulnerable adults.

16. The Department has established reasonable cause to believe that a permanently disqualified individual, JMS, is living in Licensees' adult foster care home.

17. Licensees failed to prove by a preponderance of the evidence that they preclude physical access by JMS to JF and NV without continuous (24 hours per day, seven days per week), direct supervision as defined in Minn. Stat. § 245C.02, subd. 8.

18. Because a permanently disqualified individual resides in Licensees' adult foster care home, the Licensees have failed to prove by a preponderance of the evidence that they are in full compliance with Minn. R. 9555.6125 (4) (D).

19. Notwithstanding the best interests of JF and NV, the Commissioner must revoke the adult foster care license of Licensees.

20. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

21. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that:

The revocation of the adult foster care license of Licensees be confirmed.

Dated: September 16, 2011

s/M. Kevin Snell  
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M. KEVIN SNELL  
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.



## **NOTICES**

This report is a recommendation, not a final decision. The Commissioner of Human Services (Commissioner) will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. §§ 14.61 and 245A.07, subd. 2a (b), the parties adversely affected have ten (10) calendar days to submit exceptions to this Report and request to present argument to the Commissioner. The record closes at the end of the ten-day period for submission of exceptions. The Commissioner then has ten (10) working days from the close of the record to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, Box 64998, St. Paul MN 55155, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## **MEMORANDUM**

Although the result in this proceeding is unfortunate for Licensees and the vulnerable adults in their care, application of the law to the relevant facts permits only one result.

### **Relevant Facts**

There is no dispute regarding the relevant facts. Licensees' son, a resident in the foster care home at the time of the hearing, admitted to a crime that, upon application of the applicable law, requires that he be permanently disqualified from direct access to JF and NV. Because JMS lives in the adult foster care home, it would not be possible to preclude physical access by JMS to JF and NV unless one of the Licensees is awake 24 hours per day, seven days per week, personally supervising JMS. There is no evidence in the record suggesting that such supervision is being provided. The fact that JMS now sleeps in a different bedroom does not alter the result.

### **Application of the Disqualification Statute and Licensing Rule**

The operation of the disqualification statutes in matters like this, involving permanent disqualifications, allows the Commissioner no leeway or discretion to either set aside the disqualification or grant a variance that would allow direct access to vulnerable adults by the disqualified individual under any conditions.<sup>42</sup> The evidence in the record suggests that JMS presents no actual risk of harm to JF or NV. However, the actual risk of harm is only relevant in the case of disqualifications that are for the

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<sup>42</sup> Conclusions 5-12.

limited durations of 10 or seven years.<sup>43</sup> Those types of disqualifications may be set aside, and protective conditions imposed, if the required analysis of the relevant factors proves that the disqualified individual presents no risk of harm.<sup>44</sup> Such is not the case here.

The fact that the best interests of JF and NV would be served by the continuing care by Licensees is also irrelevant by operation of the applicable law and rule.

The Department argued that it is not possible for Licensees to maintain their license, even if JMS no longer resided in the home,<sup>45</sup> because he might visit. This is an incorrect interpretation of the law. Non-resident disqualified individuals that are strictly supervised in accordance with the disqualification statute may visit licensed facilities.<sup>46</sup>

For these reasons the Administrative Law Judge must recommend that the Commissioner revoke Licensees' adult foster care license because a permanently disqualified individual is living in the foster care home.

**M. K. S.**

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<sup>43</sup> See, Minn. Stat. § 245C.15, subds. 2, 3, and 4 (2010).

<sup>44</sup> Minn. Stat. § 245C.22, subd. 4 (2010).

<sup>45</sup> Conclusion 12.

<sup>46</sup> *Id.*; Conclusions 7& 8.